SATHIYASELAN KRISHNAN & ORS v. FLYFIREFLY SDN BHD

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[CIVIL APPEAL NO: 12A-157-10-2014]
15 APRIL 2015

CIVIL PROCEDURE: *Summary judgment – Triable issues – Whether existed – Whether there were arguable questions of law which were unfit for summary determination*

CONTRACT: *Employment contract – Breach – Premature resignation from employment – Compensation – Whether agreed liquidated sum was in substance a penalty – Whether actual loss proved – Whether s. 75 Contracts Act 1950 applicable – Whether provisions in contract unconscionable – Whether there were arguable questions of law which was unfit for summary determination*

Pursuant to a fixed term contract, the first appellant was employed by the respondent as a pilot with the rank of captain to fly aircrafts operated by the respondent. The second and third appellants were guarantors of the first appellant to secure the performance and compliance of his obligations under the contracts. The contract between the first appellant and the respondent was evinced by the respondent's letter of offer which incorporated the general terms and conditions of employment (Pilot) and ATR conversion training agreement. However, disputes arose due to the first appellant's premature resignation from his employment. The respondent alleged that the first appellant breached the ATR conversion training agreement. As such, the respondent demanded for compensation of RM136,155.80 which comprised of the first appellant's salary *in lieu* of short notice, over utilised annual leave, overpayment of salary for the month of April 2013 and the agreed liquidated sum of RM100,000. Subsequently, the respondent filed an action in the Sessions Court and summary judgment was granted in favour of the respondent. It was held, *inter alia,* that the appellants had to, either jointly or severally, pay the bond amount of RM100,000 to the respondent. Dissatisfied, the appellants filed the present appeal. The appellants had narrowed down their contentions in this appeal to a singular triable issue, *ie,* that the agreed liquidated sum was in substance a penalty. It was argued, *inter alia,* that (i) the first appellant was already ATR rated even before the contract was executed and as such, the first appellant was not required and did not undergo a full ATR training programme; and (ii) by virtue of s. 75 of the Contracts Act 1950, the respondent was only entitled to recover reasonable compensation that required proof of actual loss incurred by the respondent, as per in *Selva Kumar Murugiah v. Thiagarajah Retnasamy*. The respondent, however, submitted that the agreed liquidated sum of RM100,000 was recoverable *simpliciter* without the need to prove the actual loss incurred.

Held (allowing appeal; summary judgment granted in relation to the award of RM100,000 could not be sustained):

(1) The respondent might still be able to enforce the agreed liquidated sum under the *Selva Kumar* approach if it could be shown that the proof and assessment of the loss was difficult or impracticable. However, the respondent did not depose as such in its various affidavits in support but adopted the position that the liquidated agreed sum had been freely and consensually agreed to by the parties at the time of contracting. Further, the opposing approaches submitted by the parties were not only complex but also presented arguable questions of law which was unfit for summary determination. (paras 21 & 22)

(2) The contractual provision for the liquidated agreed sum was not compensation for all losses suffered by the respondent for premature resignation but compensation for the training afforded to the first appellant. The latter was narrower than the former that may include the difficulty, inconvenience and disruption to the respondent of having to make alternative arrangements to secure replacement pilots. *Prima facie,* the latter appeared to be normal and ordinarily provable expenses, the heads of which were already identified in the general terms and conditions of employment (Pilot). (para 23)

(3) The stipulated sum of RM100,000 was rather high and possibly a deterrent against pilots prematurely leaving the employment of the respondent. A provision for deterrence was unconscionable and would invariably be struck down by the court as an unenforceable penalty. In fact, the contractual provision here had been expressly stated in the letter of offer to be a penalty. In the circumstances, there was merit in the appeal and accordingly, that part of the summary judgment in relation to the award of RM100,000 could not be sustained. For the avoidance of doubt, the rest of the summary judgment remained unaffected. (paras 23-25)

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Brisdale Resources Sdn Bhd v. Law Kim [2004] 6 MLJ 76 ***(refd)***

Government of Malaysia v. Thelma Fernandez & Anor [1966] 1 LNS 55 HC ***(refd)***

Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2009] 4 CLJ 569 FC ***(refd)***

Lebbey Sdn Bhd v. Tan Keng Hong & Anor [2000] 1 CLJ 136 HC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 4 CLJ 725 FC ***(refd)***

Realvest Properties Sdn Bhd v. The Co-operative Central Bank Ltd (Under Receivership) [1996] 3 CLJ 823 FC ***(refd)***

Reliance Shipping & Travel Agencies Sdn Bhd v. Low Ban Siong [1996] 2 CLJ 960 CA ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 75
Rules of Court 2012, O. 55 r. 2

For the appellants - Mohd Reza Mohd Rafie; Chambers Of Rafie Mohd Shafie & Assocs
For the respondent - Saranjit Singh (Hoe Mei Lei with him); M/s Saranjit Singh

[Appeal from Session Court; Suit Case No: A52NCVC-55-02-2014]

Reported by Kumitha Abd Majid

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is an appeal brought by the appellants/defendants against the summary judgment dated 18 September 2014 entered by the Sessions Court in favour of the respondent/plaintiff.

[2] The first appellant was employed by the respondent as a pilot with the rank of captain to fly the aircrafts operated by the respondent pursuant to a fixed term contract ("contract"). The second and third appellants were guarantors of the first appellant to secure the performance and compliance of his obligations under the contract.

[3] By reason of the first appellant's premature resignation from his employment under the contract, the respondent filed the action against the appellants in the Sessions Court on 19 February 2014.

[4] By a notice of application dated 6 May 2014, the respondent applied for summary judgment. The affidavits that were filed in support and in opposition of the application were as follows:

(i) respondent/plaintiff's affidavit in support affirmed by Ismail Fahmi bin Abdul Rahman on 6 May 2014;

(ii) appellants/defendants' affidavit in reply affirmed by Sathiyaselan a/l Krishnan on 3 June 2014;

(iii) respondent/plaintiff's affidavit in reply affirmed by Ismail Fahmi bin Abdul Rahman on 23 June 2014;

(iv) respondent/plaintiff's further affidavit (1) affirmed by Ignatius Ong Ming Choy on 23 June 2014;

(v) respondent/plaintiff's further affidavit (2) affirmed by Tan Gah Ling on 23 June 2014;

(vi) appellants/defendants' affidavit in reply (2) affirmed by Sathiyaselan a/l Krishnan on 3 July 2014;

(vii) respondent/plaintiff's affidavit in reply (2) affirmed by Ismail Fahmi bin Abdul Rahman affirmed on 16 July 2014; and

(viii) respondent/plaintiff's further affidavit (3) affirmed by Tan Gah Ling on 16 July 2014; and

(ix) appellants/defendants' affidavit in reply (3) affirmed by Sathiyaselan a/l Krishnan on 22 July 2014.

[5] The Sessions Court Judge on 18 September 2014, gave summary judgment to the respondent, *inter alia*, ordering the appellants whether jointly or severally to pay the bond amount of RM100,000.

[6] After having read the appeal record and the written submissions filed, I heard counsel on 20 March 2015.

Salient Facts

[7] The contract between the first appellant and the respondent is evidenced by a letter of offer of the respondent dated 6 April 2012 ("letter of offer") that was duly accepted by the first appellant which incorporated the general terms and conditions of employment (Pilot) and ATR conversion training agreement of the respondent. The aforesaid parties as well as the second and third appellants also formally executed the ATR conversion training agreement on 25 June 2012.

[8] The relevant and material provisions of the contract as set out in letter of offer, general terms & conditions of employment (Pilot) and the ATR training conversion agreement are as follows with the necessary emphasis added:

Letter of Offer

c. You are entering into an agreement with two (2) sureties acceptable to the Company ("Training Agreement") which in principle will bind you to be in the employment of the Company during the period of your training and thereafter (ie, after successful completion of your training) for at least sixty (60) months. The full terms and conditions of the Training Agreement are as stated in the Training Agreement enclosed with this letter. The penalty and/or consequences of a breach and/or non compliance with your obligation to compulsorily serve the Company during your bonded period, affect both you and your sureties are set out in the Enclosed Training Agreement.

Your employment shall be graded as Captain and you shall be classified under the category of Pilot.

1. Contract Duration

Your employment shall be for a fixed period of five (5) years commencing on 25 June 2012 until 24 June 2017. Your employment with the Company shall terminate automatically on 25 June 2017.

General Terms & Conditions of Employment (Pilot)

ARTICLE A6 - LICENCES, TRAINING AND BOND

3. An Employee who undergoes conversion training by the Company to enable him to fly a different type of aircraft will be required to enter into an agreement with the Company ("Training Agreement") prior to or upon commencement of such training which shall obligate the said Employee remaining in the services of the Company for a period as stipulated in the Training Agreement unless otherwise agreed to in writing.

4. In the event, an Employee who enters into such Training Agreement referred to in Article A6(3) leaves the employment of the Company or is dismissed or terminated by the Company for breach of contract or misconduct at any time during the currency of the Training Agreement, the said Employee shall be liable to pay to the Company the cost of the conversion training (agreed liquidated sum) as more specifically set out in the Training Agreement.

5. The total cost of conversion training referred to in Article A6(3) shall include (but is not limited to):

a. basic salary paid to the Employee during the period of conversion training;

b. cost of travel, where applicable;

c. cost of hotel accommodation, where applicable;

d. daily allowances, where applicable, paid to the Employee during the period of conversion training; and

e. total costs of training, including but not limited to simulator training and flying training.

ATR Conversion Training Agreement

1. Obligations of the Pilot

It is hereby agreed by the Pilot that:

c. the Pilot will continue to be in service with the company during the Training period and thereafter to serve the Company (or such other affiliate thereof upon instructions of the Company, if required) for a minimum period of sixty (60) months from the date of commencement of the Training.

4. It is further agreed as follows:

c. If the Pilot during the term of this Agreement:

ii. resigns or abandons his employment with the Company without the consent of the Company;

the Company may terminate this Agreement and demand from the Pilot and the Guarantors for the amount Ringgit Malaysia One Hundred Thousand (RM100,000) within thirty (30) days from the date of termination of this Agreement.

[9] The first appellant tendered his resignation of immediate effect by letter dated 26 April 2013 served on the respondent.

[10] The respondent replied to the first appellant by letter dated 29 April 2013 primarily stating that the first appellant was in breach of the ATR conversion training agreement and demanded for compensation of RM136,155.80 comprising of salary *in lieu* of short notice, over utilised annual leave, overpayment of April 2013 salary and the agreed liquidated sum of RM100,000.

[11] The respondent thereafter through its solicitors, Messrs. Saranjit Singh's letter dated 25 September 2013 made the demand for compensation from the respective appellants.

Contentions Of The Appellants

[12] For purposes of this appeal, the appellants have narrowed down their contentions to the singular triable issue that the RM100,000 agreed liquidated sum is in substance, a penalty. This is because the first appellant was already ATR rated prior to the entering the contract. Hence, he was not required and did not undergo a full ATR training programme but instead a revised ATR LHS training programme which was a refresher type course. Accordingly and by virtue of s. 75 of the Contracts Act 1950, the respondent was only entitled to recover reasonable compensation that required proof of actual loss incurred by the respondent.

[13] In this respect, the appellants relied on the following dicta of Siti Norma Yaakob JCA (as she then was) in *Reliance Shipping & Travel Agencies Sdn Bhd v. Low Ban Siong* [1996] 2 CLJ 960; [1996] 2 MLJ 543 which was also a case of premature termination of employment:

> *The recent judgment of the Federal Court in Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy [1995] 2 CLJ 374; [1995] 1 MLJ 817, gives a complete picture of how s. 75 is to be interpreted and after going through all the authorities including those cited above, Peh Swee Chin FCJ concluded that the qualifying words in s. 75 'whether or not actual damage or loss is proved to have been caused thereby' are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss as opposed to all other cases, where a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.*
>
> Having stated the law, we now turn to the facts of the appeal before us. Dato Azmel Maamor J reversed the decision of the Sessions Court on the grounds:
>
> (1) that the RM20,000 claimed being a penalty is unenforceable; and
>
> (2) that it is incumbent upon the appellants to prove the actual damage incurred by them for providing the on the job training for the respondent.

Whilst we endorse the latter of the learned judge's finding, we consider the former of his finding to be erroneous. *Despite the nature of the amount stated in the agreement, the measure of damages is enforceable provided that there is proof by the appellants that they had suffered loss or damage limited to the extent of the quantum of the 'agreed compensation'. In this case, the nature of the loss suffered by the appellants is inter alia the expenses incurred by them for providing on-the-job training for the respondent. They should not have any difficulty in proving that loss if they had kept an account of the total expenses incurred for such training.* The learned judge however found that no such proof was forthcoming from the appellants as they were content to rely on the amount stipulated in the agreement as their measure of damages without proving actual loss. (emphasis added)

Contentions Of The Respondent

[14] The respondent however submitted that the agreed liquidated sum of RM100,000 is recoverable *simpliciter* without the need to prove the actual loss incurred by relying on the following dicta of Raja Azlan Shah J (as he then was) in *Government of Malaysia v. Thelma Fernandez & Anor* [1966] 1 LNS 55; [1967] 1 MLJ 194:

The terms are explicitly clear and need no further elucidation. The contention of the defendants that the post the student held was not commensurate with the education he had received is not valid. If the defendants are alleging that the student should be posted to a secondary instead of a primary school then, in the light of the aforesaid terms of the agreement, I am of the view that their contention does not hold water. Having tried various means to discharge himself which failed, the student left the plaintiff's service without their approval or consent.

Finally, the defendants contended that the clause in their agreement providing for the "refund of all monies which have been paid by the plaintiffs in respect of the student's course of training" is a penalty and therefore not enforceable.

When parties enter into a contract they may expressly stipulate not only their primary obligations and rights under the contract, namely, those which are discharged by their performance of the contract, but also their incidental obligations and rights, namely, those which arise as a result of non-performance of any primary obligation by one of the parties to the said contract. Of these incidental obligations and rights, the commonest is the obligation of the non-performer to make to the other party and the corresponding right of such other party to claim from the non-performer reparation in money for any loss sustained by the other party which results from the failure of the non-performer to perform his primary obligation. The right of such parties to make such a stipulation is subject, however, to the rule of public policy that the court will not enforce it if it is satisfied that the stipulated sum was not a genuine estimate of the loss likely to be sustained by the party not in breach but was fixed in terrorem or unconscionable and extravagant and was therefore in the nature of a penalty. Where the court refuses to enforce the "penalty clause" of this nature, the party aggrieved is relegated to his right to claim a reasonable sum not exceeding the sum so stipulated under the provisions of section 75 of the Contract (Malay States) Ordinance, 1950.

The onus of showing that a stipulation is a "penalty clause" lies on the person who is sued on it and the test to be applied is the observation of Lord Dunedin in *Public Works Commissioner Hills* [1906] AC 368 375.

> … the criterion of whether a sum - be it called penalty or damages - is truly liquidated damages, and as such not to be interfered with by the court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a 'genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation'. The *indicia* of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.

Sometimes the terms of the clause may themselves be sufficient to give rise to the inference that it is a penalty. It is an inference only and may be rebutted. Lord Dunedin in his speech in *Dunlop Pneumatic Tyre Co v. New Garage & Motor Co* [1915] AC 79 had found occasion to discuss the terms which give rise to such an inference. He referred to the illustration given by Lord Halsbury in *Clydebank Engineering & Shipbuilding Co v. Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 at p11 and suggested as one of the various tests that "it will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach". On the other hand, "It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

To my mind, the stipulated sum which is said to give rise to the inference that it is a penalty is not extravagantly or unconscionably greater than the loss which is liable to result from the breach. It is not like the case of the builder who was required to build a house for £50 and who had to pay a million for his breach. That extravagance would at once be apparent. "A great deal must depend on the nature of the transaction - the thing to be done, the loss likely to accrue to the person who is endeavouring to enforce the performance of the contract, and so forth. It is not necessary to enter into a minute disquisition upon that subject, because the thing speaks for itself." (Per Lord Halsbury in the Clydebank case at p. 10). In the present case the plaintiffs obtained no undue advantage. They wanted to train qualified teachers in order to implement their policy in providing education for the ever-growing population in post-Merdeka Malaysia. It is a notorious fact that the plaintiffs were and still are short of qualified teachers. *Therefore, the parties envisaged, when they entered into the contract, the possibility of its premature determination on the student's breach and they therefore took steps to avoid the uncertainty, the difficulty, and the expense of proving in a court of law the actual loss sustained in that event by agreeing in advance on an ascertainable sum to be*

paid by the student which represents a portionable estimate of the probable or possible loss which the plaintiffs would incur. What in effect they have agreed to is this: "The Government wants to train the student to be a qualified teacher but if, after graduation but before the expiry of the minimum five-year period he were to leave the service without approval, he would have to pay back the expenses incurred in training him so that the Government can find another suitable person to be trained as a qualified teacher." **That, in my view, is not an extravagant or unconscionable sum compared with the greatest loss that could conceivably be proved to have followed from the breach.** On the other hand, it is the plaintiffs who have to suffer a great deal more and the damage they are likely to suffer is far greater than the stipulated sum agreed upon, not to mention that they would lose a qualified teacher and the time factor to train another one. The criterion here is the failure to implement the Government's education policy. That, in my view, far out-weighed any suggestion that it is a penalty. If it is argued that "what would one qualified teacher do for the purpose?", then the answer would be that very thing that it is intended to avoid is this kind of uncertainty, the difficulty and expense which would be necessary if one were to attempt to prove the damage caused. That was the sort of argument counsel in the Clydebank case had put forward, "what would one torpedo-boat do for that purpose," but that argument did not find favour with their Lordships.

As I have said, the substantial question in this case is whether the stipulated sum is a penalty or otherwise. That is a question of law. **I have determined that question of law. If I were to hear this case at the proper hearing it would require no further evidence and no further argument.** All that is necessary to decide is already included in the present application. There is no serious question of law involved. (See *Gore v. Gore* [1964] MLJ 184). (emphasis added)

Findings Of The Court

[15] The law on summary judgment is plainly set out in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 wherein Mohd Azmi SCJ held as follows:

Under an O. 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially under an O. 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

A *Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the Court should exercise its duty under O. 14. If the legal point is understood and the Court is satisfied that it is unarguable, the Court is not prevented from granting a summary judgment, merely because "the question of law is at first blush of some complexity and therefore takes a little longer to understand".* (See *Cow v. Casey* [1949] AER 197; and *European Asian Bank*
B *AG v. Punjab & Sind Bank* [1983] 2 AER 508 at 516). (emphasis added)

[16] Upon my review of the grounds of decision of the learned sessions court judge, she was principally of the view that the resignation of the first appellant was accepted by the respondent. Accordingly, the respondent was entitled to demand for the agreed liquidated sum as provided in the contract
C which was not disputed at the time of the execution of the contract and therefore binding on the parties. She merely dismissed the s. 75 argument on frivolity without particularisation.

[17] Nevertheless, by virtue of O. 55 r. 2 of the Rules of Court 2012, this
D appeal is by way of rehearing in the sense that the matter will be considered afresh without reference to the reasons and written grounds of the sessions court; see para. 55/2/1 Malaysian Civil Procedure 2013.

[18] The law on the enforcement of contractually agreed liquidated sum is provided in s. 75 of the Contracts Act 1950 which provides:

E 75. Compensation for breach of contract where penalty stipulated for

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have
F been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation - A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

G Exception - When any person enters into any bail-bond, recognisance, or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Federal Government or the Government of any State, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the
H condition of any such instrument, to pay the whole sum mentioned therein.

Explanation - A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

I

Illustrations

(a) A contracts with B to pay B RM1,000, if he fails to pay B RM500 on a given day. A fails to pay B RM500 on that day, B is entitled to recover from A such compensation, not exceeding RM1,000, as the court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B RM5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation, not exceeding RM5,000, as the court considers reasonable.

(c) A gives a recognisance binding him in a penalty of RM500 to appear in court on a certain day. He forfeits his recognisance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of RM1,000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the court considers reasonable.

(e) A who owes money to B, a moneylender, undertakes to repay him by delivering to him 10 gantangs of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 gantangs. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of RM1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows RM100 from B and gives him a bond for RM200 payable by five yearly instalments of RM40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

[19] The Federal Court has authoritatively interpreted s. 75 in *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 417 as summarised in *Reliance Shipping & Travel Agencies Sdn Bhd v. Low Ban Siong* (*supra*). In the result, the traditional English law approach to penalties and liquidated damages as seen in *Government of Malaysia v. Thelma Fernandez & Anor* (*supra*) seemingly ceased to be applicable. In essence, the Selvakumar approach resulted in the general requirement of actual loss suffered to be proved unless the nature of it is such that it is difficult or impracticable for the court to assess. There were nevertheless thereafter also pockets of exception recognised by the courts such as on additional default interest on loans; see *Realvest Properties Sdn Bhd v. Co-operative Central Bank Ltd (Under Receivership)* [1996] 3 CLJ 823; [1996] 2 MLJ 461 and where the stipulated loss is one that is prescribed in a statutory standard form of contract; see

Brisdale Resources Sdn Bhd v. Law Kim [2004] 6 MLJ 76 and *Lebbey Sdn Bhd v. Tan Keng Hong & Anor* [2000] 1 CLJ 136; [2000] 7 MLJ 521 where actual loss need not be proved.

[20] Be that as it may, there is subsequent conflict seen between the Federal Court case of *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725; [2007] 5 MLJ 501 and *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569; [2009] 6 AMR 733. By the former, the English approach was reintroduced but the latter re-endorsed *Selva Kumar Murugiah v. Thiagarajah Retnasamy* (*supra*) without overruling the former. The legal position is thus to my mind unsettled.

[21] As for the appeal herein, the appellants do not appear to be contesting on the lawfulness of the termination of the contract and on the respondent's consequential claims save for the liquidated agreed sum of RM100,000. The thrust of the appellant's submission is that the *Selvakumar* approach required proof of the actual loss incurred by the respondent. On the other hand, the respondent's submission in justifying the summary judgment obtained is that the liquidated agreed sum is enforceable *simpliciter* following the English approach without the necessity to prove the actual loss suffered. Both this opposing approaches are however, in my view, not only complex but also presenting arguable questions of law unfit for summary determination as seen from the unsettled interpretation of s. 75 of the Contracts Act in the Federal Court cases. A further arguable question of law is who bears the onus of proof to demonstrate that the stipulated sum is a penalty or a genuine pre estimate of loss; c.f. *Government of Malaysia v. Thelma Fernandez & Anor* (*supra*) and my views in [1993] 1 MLJ lxxxi.

[22] Be that as it may, the respondent might still be able to enforce the liquidated agreed sum under the *Selvakumar* approach if the respondent could show that the proof and assessment of the loss is difficult or impracticable. However, the respondent did not depose as such in its various affidavits in support but adopted the position that the liquidated agreed sum had been freely and consensually agreed to by the parties at the time of contracting.

[23] On careful reading of the relevant clauses of the contract, I observed that the contractual provision for the liquidated agreed sum is not compensation for all losses suffered by the respondent for premature resignation but compensation for the training afforded to the first appellant. The latter is narrower than the former that may include the difficulty, inconvenience and disruption to the respondent of having to make alternative arrangements to secure replacement pilots. *Prima facie*, the latter appears to me to be normal and ordinarily provable expenses, the heads of which are as already identified in cl. 5 of the general terms and conditions of

employment (Pilot). Besides, I am also of the view that the amount of the stipulated sum of RM100,000 cursorily seems rather high and possibly a deterrent against pilots prematurely leaving the employment of the respondent. A provision for deterrence is unconscionable and will invariably be struck down by the court as an unenforceable penalty. In fact, I noted that the contractual provision here has been expressly stated in the letter of offer by the respondent to be a penalty.

[24] In the circumstances, I find that there is merit in the appeal and accordingly that part of the summary judgment relating to the award of the RM100,000 cannot be sustained.

Conclusion

[25] For the foregoing reasons, I allow the appeal to the extent that para. (A) and para. (E) that relates to para. (A) of the summary judgment dated 18 September 2014 is remitted to the sessions court for trial. For the avoidance of doubt, the rest of the summary judgment remains unaffected.

[26] The respondent shall pay the appellants the costs of this appeal amounting to RM2,500.